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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA Plaintiff, vs. STEVEN CARROLL DEMOCKER, *Defendant.*	No. P1300CR20081339 Division 6 **MOTION TO DECLARE DEATH QUALIFICATION OF THE JURY UNCONSTITUTIONAL FOR ITS FAILURE, IN PRACTICE, TO *MEET THE MINIMUM* CONSTITUTIONAL REQUIREMENTS SET FORTH IN *FURMAN, GREGG* AND THEIR PROGENY** (Oral Argument requested)

Defendant Steven C. DeMocker, by and through counsel, based on the federal and state constitutional right to due process, trial by jury, right to counsel, equal protection, cruel and unusual punishment, confrontation, compulsory process, right to remain silent, and right to appeal clauses of the federal and Arizona Constitutions, and the first, fourth, sixth, eighth, ninth, tenth, and fourteenth amendments to the United States Constitution, and counterparts in the Arizona Constitution, respectfully

requests that this Court declare the death qualification of the jury unconstitutional and strike the death notice in this case or, in the alternative, to adopt a "two jury" procedure similar to the approach recently adopted in New Mexico, whereby a second death-qualified jury would be empanelled only if Mr. DeMocker is found guilty by a non-death qualified jury at the guilt/innocence phase of his trial. This Motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

There now exists a substantial body of uncontroverted research conducted with actual capital jurors, which shows there are at least six critical failings with death qualified juries, in practice. These flaws establish that the death penalty is incapable of being applied in a manner that comports with federal and state constitutional precedents.

These six proven fatal flaws in the application of the death penalty are:

- Premature decision making;
- Failure of jury selection to remove large numbers of death biased jurors (*Morgan* excludables)[1] as well as the overall biasing effect of the selection process itself;
- Pervasive failure by jurors to comprehend and/or follow penalty instructions;
- Widespread erroneous beliefs amongst jurors that a death sentence is required;
- Wholesale evasion of responsibility for the punishment decision — believing that responsibility lies elsewhere; and
- Racism.

In evaluating the real life understandings of actual capital jurors, Mr. DeMocker asks this Court to examine a substantial body of peer-reviewed, validated, and uncontroverted scientific evidence, focusing mostly on research conducted and

[1] *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222 (1992).

analyzed by social scientists working with the Capital Jury Project (hereinafter, "CJP") — a nation-wide National Science Foundation funded research group which has spent more than ten years thoroughly analyzing how real capital juries actually go about making real capital sentencing decisions — and then comparing their findings to the Supreme Court's pronouncements reviewed in the first section.

In the alternative, Mr. DeMocker asks this Court to adopt the "two jury" procedure from the neighboring state of New Mexico. This procedure was recently promulgated by the New Mexico Supreme Court.[2] Under their rules, the proceedings in a capital case begin with jury selection having nothing to do with death penalty issues. In the event of a finding of guilt by the initial jury, an additional venire is brought in for death qualification and a sentencing proceeding. This Court should adopt a similar procedure here if the Court does not otherwise strike the death penalty as requested.

I. The Capital Jury Project.

The Capital Jury Project (hereinafter CJP) was created in 1990, with funding from the Law and Social Sciences Program of the National Science Foundation (grant NSF SES-9013252). The nationally renowned social scientist, Professor William J. Bowers, Principal Research Scientist at the College of Criminal Justice, Northeastern University, has served as the CJP's founder, director, and Principal Investigator since its inception. Dr. Bowers, who earned his B. A. in economics and political science at Washington & Lee University, and his Ph. D in sociology from Columbia University, has written numerous articles and texts on capital punishment and on jury decision-making in capital cases. Two of his texts, Executions In America (1974), and Legal Homicide: Death As Punishment In America, 1864-1982 (1984), have been cited with

[2] http://www.nmcompcomm.us/nmrules/NMRules/5-704_11-30-2009.pdf.

approval in more than half a dozen United States Supreme Court decisions, including the Court's landmark decision in *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Articles he has written, based on the data collected and analyzed by CJP researchers, have played a substantial role in such Supreme Court decisions as *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187 (1994), which found unconstitutional a capital juror's decision to sentence a capital defendant to die because the juror harbored false beliefs with respect to whether and/or when a life-sentenced inmate would be eligible for release on parole. A number of articles summarizing the findings of the CJP studies are submitted herewith as appendices[3].

The Capital Jury Project is a national program of research on the decision-making of capital jurors conducted by a consortium of university based researchers, with the support of the National Science Foundation.[4] The findings of the CJP are based on in-depth interviews with persons who have actually served as jurors in capital trials. The interviews chronicle the jurors' experiences and decision making over the course of the trial, identify points at which various influences come into play, and reveal the ways in which jurors reach their final sentencing decisions.[5]

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[3] See e.g Apps. A, B, C, D, E, F, G, and J.

[4] The CJP was undertaken by university-based investigators specializing in the analysis of data collected in their respective states and collaborating to address the following objectives of the Project: (1) to examine and systematically describe jurors' exercise of capital sentencing discretion; (2) to identify the sources and assess the extent of arbitrariness in jurors' exercise of capital discretion; and (3) to assess the efficacy of the principal forms of capital statutes in controlling arbitrariness in capital sentencing.

[5] The research is based on a common core of data collected in the participating states. The investigators cooperatively developed a core juror interview instrument and enhanced the usefulness of this instrument in their respective states by adding to the information gathered in the core interviews, conducting additional interviews in selected cases of special interest, and incorporating additional case-specific data from other sources. The juror interviews obtained data on some 700 variables through structured questions used in all states, and also included open-ended questions that called for detailed narrative accounts of the respondents' experiences as capital jurors. Advanced law and social science students working under the supervision of the various faculty investigators carried out much of the interviewing and other data collection in the respective states. All jurors selected for interviews were guaranteed confidentiality. The preparation of the interview data for state-level and project-wide statistical analyses was carried out at the College of Criminal Justice, Northeastern University under the direction of William J. Bowers, Principal Investigator of the CJP (See App. "J": Bowers, The Capital Jury Project: Rationale, Design, And Preview Of Early Findings (1995) 70 Ind. L. J. 1043, 1082, n. 206 for further information on the interview questions and methods used).

The CJP began interviewing jurors in the summer of 1991 in eight states. To date, interviews have been completed with 1198 jurors from 353 capital trials in 14 states.[6] These states were chosen for this research to reflect the principal variations in guided discretion capital statutes.[7] Within each state, 20 to 30 capital trials were picked to represent both life and death verdicts.[8] From each trial, a target sample of jurors was systematically selected for in-depth three-plus hour personal interviews. Since 1993, some 40 articles presenting and discussing the findings of the CJP have been published in scholarly journals.[9]

These states analyzed are responsible for 71.6% of the 1029 persons who were executed between 1977 and July 1, 2006 and for housing 75% of the 3,373 persons on death row in our state, federal and military prisons.[10]

II. How Real Capital Jurors Actually Make Their Decisions.

The following is a brief review of the data which describe the processes by which real jurors, sitting on real capital cases, make the decision of whether a capital defendant should live or die.[11] These data reveal profound discrepancies between what the Arizona and Federal Constitutions require of capital jurors and how real

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[6] Capital Jury Project Website at http://www.albany.edu/scj/CJPwhat.htm.

[7] The sample was designed to include (1) states with "threshold," "balancing," and "directed" statutory guidelines for the exercise of sentencing discretion; (2) states with "traditional" and "narrowing" statutory definitions of capital murder; and (3) states that make the jury sentencing decision binding and those that permit the judge to override the jury's decision. For further details about sampling states, *see* App. "J", Bowers, supra note 22 at 1077-1079)

[8] The sample of trials was restricted to those in which the defendant was charged with a murder punishable by death, convicted of that murder in the guilt phase of the trial, and sentenced to life or death by a jury in the sentencing phase of the trial. The sampling plan for each state called for an equal representation of trials that ended in life and death sentencing decisions to maximize the potential for comparing and contrasting jurors in "life" and "death" cases within each state. Hence, trials were not sampled to be strictly representative within states or within the nation as a whole, but to facilitate analytic comparisons (*see* App. "J": Bowers, supra note 22 at 1079, 1080 fn. 200-203 for further details about sampling trials within states).

[9] See the Capital Jury Project Website at http://www.albany.edu/scj/CJPpubs.htm for an updated listing of CJP related articles, commentaries, and doctoral dissertations.

[10] See, NAACP Legal Defense and Educational Fund, Inc., "Death Row, U.S.A." at http://www.deathpenaltyinfo.org/DEATHROWUSA.pdf (Summer 2006).

[11] At the hearing on this motion, Mr. DeMocker will offer a more thorough presentation of both the data and the verifiable conclusions that flow from them. What follows is intended primarily as an introduction to an area of social science about which most of us in the legal community are unaware.

jurors sitting on real capital trials throughout the nation actually make their decisions. The data, moreover, reveal that these discrepancies exist on every measure which the law imposes, both in terms of what jurors are required to do, and in terms of what jurors are prohibited from doing. The data summarized in this section of the motion establish the presence of:

1. Rampant premature decision-making which renders the penalty phase meaningless;

2. The failure of jury selection to remove large numbers of death-biased jurors, and the overall biasing effect of the selection process, itself;

3. The pervasive failure to comprehend and/or follow penalty instructions;

4. The wide-spread belief that death is required;

5. Wholesale evasion of responsibility for the punishment decision;

6. The continuing influence of race on juror decision-making; and

7. Significant underestimation of the alternative to death.

Each one of the problems revealed by the CJP data discussed below "reflects a fundamental flaw in the system; viewed altogether the evidence of system failure is overwhelming."[12]

III. Death Qualified Juries Violate Constitutional Principles.

A. Death Qualified Juries Violate Constitutional Principles By Premature Decision-Making.

The Eighth and Fourteenth Amendments dictate that there be an individualized determination of the appropriate sentence. *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973(1978). Just as the statutory scheme cannot preclude consideration of mitigating evidence, so too "the sentencer [may not] refuse to consider, as a matter of law, any relevant mitigating evidence." *Eddings v.*

[12] (See App. A: Bowers, Foglia, Still Singularly Agonizing: Law's Failure To Purge Arbitrariness From Capital Sentencing (2003) 39 Crim. Law Bulletin 51, 86.)

Oklahoma, 455 U.S. 104, 114, 102 S.Ct. 869, 877 (1982). Simply allowing the mitigating evidence to be admitted is not enough. "The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 2947 (1989) (overruled in part by *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335) ; *see also Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669 (1986) ("Evidentiary ruling excluding relevant mitigating evidence of defendant's adjustment to prison setting violates *Eddings*); *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860 (1988) (requirement of unanimous jury finding on mitigating factors created unconstitutional barrier to consideration of relevant mitigating evidence). Only when the capital juror is free to consider and give effect to all mitigating evidence is there an assurance that there has been an individualized sentencing determination. *Lockett*.

The empirical evidence establishes that nearly one half (49.2%) of all capital jurors make their sentencing decision before the penalty phase of the trial even begins; that they feel strongly about their decision; and that they do not waver from it over the course of the trial.[13] Premature decision making was present in every state studied by the CJP.[14]

> Requirements such as bifurcating the trial, allowing presentation of mitigation evidence during the sentencing phase, and the use of jury instructions aimed at guiding sentencing discretion are of little use if jurors have already decided what the penalty should be. Interviews with capital jurors throughout the country show that jurors have often decided what the penalty should be by the end of the guilt phase, before they have heard the penalty phase evidence or received the instructions on how they are supposed to make the punishment decision.

[13] See Apps. A, B, C, D, E, and J.
[14] App. A: Bowers, Foglia, supra at p. 56

App. A, at 56. Approximately 30% of all capital jurors, nationwide, made the decision that the defendant should receive the death penalty while evidence was still being introduced at the guilt phase of the trial.

Table 1[15]:	Percentage of Capital Jurors Taking Each Stand on Punishment Before Sentencing Stage of the Trial in 13 States			
States	Death	Life	Undecided	No. of jurors
Alabama	21.2	32.7	46.2	52
California	26.1	16.2	57.7	142
Florida	24.8	23.1	52.1	117
Georgia	31.8	28.8	39.4	66
Indiana	31.3	17.7	51.0	96
Kentucky	34.3	23.1	42.6	108
Missouri	28.8	16.9	54.2	59
North Carolina	29.2	13.9	56.9	72
Pennsylvania	33.8	18.9	47.3	74
South Carolina	33.3	14.4	52.3	111
Tennessee	34.8	13.0	52.2	46
Texas	37.5	10.8	51.7	120

[15] App. A.

Virginia	17.8	31.1	51.1	45
All States	30.3%	18.9%	50.8%	1135

The evidence establishes that most early pro-death jurors do not even wait for guilt-phase deliberations to begin before deciding the penalty. Pro-death jurors prejudge the penalty decision during the guilt phase, long before they have even had the opportunity to discuss it with any of their fellow jurors or heard any of the capital defendant's mitigating evidence. Many of these early pro-death jurors cite convincing proof of guilt as the reason for their early pro-death stands [16] Of course, under the law, any juror who would impose a death penalty simply on the basis of a guilty verdict for first-degree murder would be disqualified. *See Witt v. Waingwright*, 469 U.S. 412, 424, 105 S.Ct. 844, 852 (1985). For some jurors, it was the grotesque or gruesome nature of the crime that convinced them that death should be the punishment[17]. Many jurors stressed the role of physical evidence, especially photographs or video tapes, as critical in their punishment decisions[18].

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[16] App. D at 17. Jurors cite convincing proof of guilt as the reason for their early pro-death stands:

FL: When I was convinced he was guilty - when we were going through the hard evidence.

NC: After the pathologist report, after I was convinced he was the one who did it.

FL: When I knew in my heart that he was guilty ... This was after hearing the forensic evidence from prosecution.

TX: Uh, before we actually voted, before we went in there. I was pretty sure, I mean, I was absolutely sure, because I truly believe in what the Bible says and I think I told them this when they chose me.

[17] App. D at 17-18. Jurors commented as follows regarding when they pre-judged penalty:

KY. Once guilt was established that (the defendant) had committed this gruesome crime. I had no problem at all determining what punishment was applicable.

MO: Um, I'd say probably right when the prosecutor made the statement. She was stabbed twenty-two times.

Thus, many jurors attribute their early stands for death to unquestionable proof of guilt, heinous aspects of the crime, and physical evidence, especially in photographs and audio or video tape. In addition to the nature of the crime and the evidence of guilt, some early pro-death jurors focused on the defendant to explain what caused them to take a stand for death during the guilt stage of the trial. These accounts typically concerned the demeanor of the defendant[19] and the juror's perception of his future dangerousness[20] if he is not sentenced to death.

SC: When they started to talk about the brutality of the crime.

[18] App. D at 18. Jurors commented as follows regarding when they pre-judged penalty: AL: When the D.A. handed us the pictures.

CA: Video tape portion of the trial. (When the jury viewed a video tape of the killing that a store monitoring system had recorded.)

KY: After I saw pictures and hair and semen analysis.

MO: (After) looking at the pictures and seeing you know, the crime, the autopsy photos.

FL: During the evidence - when (I) saw the pictures of the victim.

MO: After I knew, when they showed us the photographs of (the victim) and how he had been murdered. I knew (the defendant) had done it by the video tape but I didn't know how severe and how gruesome it was. In a few instances they gave vivid accounts of how photo or video evidence had affected them:

NC: During the trial. I can tell you ... when we saw pictures of this woman's body, burned .... Where her feet were burned off .... Horrible, horrible pictures of this. That convinced me.

CA: Just sitting there watching (a video tape of the killing from a store monitoring system). I've seen a lot (of) stuff, but I never .... Even Arnold Schwarzenegger movies didn't affect me like that, you know? This wasn't make-believe, watching that video tape. The video tape was very powerful.

[19] App. D at 18. As demonstrated by the following jurors:

CA: Once I was convinced that he did it, I was convinced that he was kind of cold-blooded and didn't have any feelings, basically.

KY: I can't explain to you how he looked but I guess that's when I knew .... the way he sat there.

TX: I think this feeling came about over days of watching him and knowing he could do something like that again.

[20] App. D at 18-19. The defendant's likely future dangerousness is an especially prominent theme:

SC: When we heard all of the evidence I thought he would be dangerous if he got out and in thirty years he might still be dangerous.

Early pro-death jurors found the fact of guilt and the nature of the crime compelling. They believe death is called for when the crime is egregious, the evidence is explicit, the defendant appears unrepentant, or seems apt to repeat his crime. Heinousness of the crime and the dangerousness of the defendant may be relevant to the punishment decision in some states. However, *Lockett* and its progeny mandate that a decision should not be made before jurors hear any mitigation. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

In terms of how strongly early pro-death jurors felt about the decision they made to impose the death penalty, and in terms of how consistently they stuck to their early decision, the CJP data establishes that 97.4% of all early pro-death jurors "felt strongly about their early pro-death stance," with 70.4% indicting they were "absolutely convinced" and 27% indicating they were "pretty sure" about their decision. App. A at 57. The mandate of *Eddings v. Oklahoma*, 455 U.S. 104, 114, 102 S.Ct. 869, 877 (1982), that the sentencer must be able to both hear and give effect to mitigation, is not met given these findings.

> Presenting mitigating evidence during the penalty phase cannot be very effective when so many jurors declare that they were already "absolutely convinced" that the defendant deserved death before they heard any mitigation evidence. Given the human proclivity to interpret information in a way that is consistent with what one already believes, it is not surprising that most jurors never waver from their premature stance.

App. A, at 57.

CA: I feel he's like a dangerous snake. I feel that he might be a threat.

TX: Well while he was in jail waiting to go to trial for this he got in a fight. And I could see that to me, or it looked like somebody, he wasn't going to change. And if he was let back into society he would continue with his path of crimes.

CA: ...we didn't want him to get back out on the street again.

B. The Death Qualification Process Violates Constitutional Principles by its Failure to Remove Large Numbers of Death-Biased Jurors and its Overall Biasing Effect.

In *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770 (1968) the Court held that a sentence of death returned by a jury biased toward death violates the Constitution:

> A State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected ... Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution.

Id. at 522, 523.

The process of capital jury selection, itself, produces the most unqualified possible group of jurors precisely when a criminal defendant should have a right to the most qualified jurors. The studies demonstrate that the process negatively impacts the guilt/innocence phase of the capital trial in several ways.

First, by questioning potential jurors extensively about their attitudes towards the death penalty, substantial numbers of jurors believe both that the defendant must be guilty, and that apparently they are going to be asked to sentence him to death. Many jurors believe that the subtext of a capital trial voir dire is not about whether the defendant committed the murder, it is about what punishment he should receive. Moreover, many jurors, after seeing which jurors stay and which leave, believe that if

selected, it is understood that they will find the defendant guilty, and that they will sentence him or her to death.[21]

In addition to the bias towards guilty verdicts and death sentences, death-qualifying voir dire results in the least representative jury criminal defendants face. Early studies which have been validated by the CJP established rather obvious phenomena. People's attitudes towards capital punishment do not exist in a vacuum. One's attitudes about this very controversial topic, over which Americans have very divergent views, are strongly associated with a whole constellation of attitudes about the criminal justice system. These studies established, for instance, that people who support the death penalty — and who not only support it, but are able to tell the lawyers and the judge in the courtroom that they would be able to impose it — hold a number of other views about the criminal justice system that work unfairly against the capital defendant.

The data demonstrates that these jurors, much more strongly than non-death-qualified jurors, believe that if a defendant does not testify in his or her own defense, that the failure to do so is affirmative proof of guilt. Death-qualified jurors do not believe in the presumption of innocence. They believe much more strongly that "where there is smoke, there is fire." They are extremely distrustful of defense lawyers and view everything they have to say with a great deal of skepticism. On the other hand, they are extremely receptive to the prosecution and its witnesses — especially police officers — and believe them.

They do not believe in Due Process guarantees, such as requiring the prosecution to bear the burden of proof beyond a reasonable doubt. They are highly suspicious of experts called by the defense. In short, death qualified jurors are the

[21] See, e.g., Apps. P, Q and R.

jurors least representative of the community as a whole and are the jurors least likely to give a criminal defendant the benefit of the doubt.[22]

Recent research suggests that juror-eligible citizen who are excluded by either *Witherspoon* or *Witt* are less susceptible to pretrial publicity,[23] less persuaded by ambiguous expert scientific testimony[24] and more likely to find non-statutory *mitigating factors*[25] *than persons found qualified to serve as capital jurors.*

To understand why so many jurors prematurely decide to impose death the CJP researchers investigated the possibility that jury selection procedures, even when conducted pursuant to the *Witt* or *Morgan* standards, fail to identify jurors for whom death is the only appropriate penalty for the cases on which they served. The jurors were presented with the following question/matrix:

> Do you feel that the death penalty is the only acceptable punishment, an unacceptable punishment, or sometimes acceptable as punishment for the following crimes? Murder by someone previously convicted of murder; A planned, premeditated murder; Murders in which more than one victim is killed; Killing of a police officer or prison guard; Murder by a drug dealer; and, A killing that occurs during another crime.[26]

Table 2[27]	Percentages of Jurors Considering Death the Only Acceptable Punishment for Six Types of Murder by State						
State	Prior murder conviction	Planned premeditated murder	Murder with multiple victims	Killing police/ prison guard	Murder by drug dealer	Murder during another crime	N
Alabama	66.7%	54.4%	57.9%	37.5%	46.4%	36.8%	56

[22] Apps. S and T.
[23] Apps. FFF and GGG.
[24] Apps. FFF and III.
[25] Apps. FFF and HHH.
[26] App. A at 62, fn. 60.
[27] App. A at 63.

California	58.6%	41.4%	41.1%	41.4%	33.6%	17.8%	151
Florida	77.6%	64.1%	62.1%	51.3%	52.6%	19.7%	115
Georgia	70.8%	54.8%	46.6%	51.4%	47.2%	23.6%	72
Indiana	74.7%	54.5%	55.6%	44.4%	52.5%	23.2%	99
Kentucky	71.2%	56.7%	50.5%	46.6%	48.5%	18.1%	103
Missouri	75.4%	54.1%	52.5%	45.9%	38.3%	19.7%	61
N. Carolina	73.8%	68.8%	55.0%	58.8%	45.0%	21.5%	79
Pennsyl.	71.8%	65.4%	62.8%	55.1%	47.4%	28.2%	78
S. Carolina	76.3%	61.4%	54.4%	43.0%	49.1%	26.5%	113
Tennessee	78.3%	67.4%	58.7%	54.3%	43.5%	30.4%	46
Texas	76.9%	57.3%	59.5%	58.6%	48.7%	35.3%	116
Virginia	55.6%	46.7%	40.0%	48.9%	42.2%	15.6%	45
All States	71.6%	57.1%	53.7%	48.9%	46.2%	24.2%	1164

As the national data from the table above indicate, the CJP survey results documented profound deviations between what capital jurisprudence requires and what actual capital jurors believe. Many jurors who had been screened as capital jurors under *Morgan* standards, and who decided an actual capital case, approached this task believing the death penalty was the only appropriate penalty for many of the kinds of murder. In effect, mandatory death penalty laws, while banned by the Supreme Court under *Woodson*, are nonetheless applied by jurors despite the procedural safeguards of *Morgan* and discretionary statutory schemes on which jurors were instructed.

> Over half of the CJP jurors indicated that death was the only punishment they considered acceptable for murder committed by someone previously convicted of murder (71.6%); a planned or premeditated murder (57.1%); or a murder in which more than one victim was killed (53.7%). Close to half could accept only death as punishment for the killing of a police officer or prison guard (48.9%), or a murder committed by a drug dealer (46.2%). A quarter of the jurors thought only death was acceptable as punishment for a killing during another crime (24.2%), i.e., a "felony murder." Nearly three out of ten jurors (29.1%) saw death as the only acceptable punishment for all of these crimes.

App. A, at 62; accord Apps. B thru E.

In addition to identifying large numbers of jurors who enter the jury box with their own personal mandatory death penalty legislation to guide them — as opposed to the court's instructions on the discretionary statutory schemes — researchers identified to a statistical certainty that there was a direct relationship between taking a strong premature stance for death and being identified as a "death is the only appropriate sentence" juror.

A juror who believes that death is the only appropriate penalty for murdering a child or for murdering more than one person, or for committing those kinds of murders after the defendant had committed an earlier murder, is invariably going to decide that death is the only appropriate sentence once they determine guilt. Thus, there is no individualized determination of sentence as the Constitution requires. As many of the jurors expressed, the penalty phase was nothing but a complete waste of time.[28]

A juror who believes that death is the only acceptable punishment for certain categories of murder can hardly give meaningful consideration to evidence in

[28] "I thought it (the penalty trial) was kind of silly, to be perfectly honest. A rotten childhood is not the question we had to answer "... "Character witness didn't really seem relevant to the issue ... Everything went back to what he had done and I think everyone had their mind made up before the penalty phase started." App. I, at 166.

mitigation. Such a juror who "will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror." *Morgan* at 729. It is for that reason that the *Morgan* Court went on to say that "[i]f even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." *Id.*

C. Death Qualified Juries Violate Constitutional Principles Because They Fail to Comprehend and/or Follow Penalty Instructions.

The requirement of clear and objective standards to guide capital jurors has led the Court to strike down vague statutory criteria which cannot be reviewed objectively on appeal. In *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759 (1980), Georgia's "outrageously or wantonly vile, horrible, and inhuman" aggravator was invalidated. The Court concluded it was so vague that it failed to provide any meaningful guidance to the jury. A capital jury making a sentencing decision on such a factor was as unconstrained in its sentencing choice and juries were under the schemes invalidated by Furman.

Oklahoma's "especially heinous, atrocious, or cruel" standard was struck down on this same basis in *Maynard v. Cartwright*, 486 U.S. 356 (1988). The *Maynard* Court reaffirmed that its Eighth Amendment jurisprudence since Furman had "insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Id.* at 362.

In *Stringer v. Black*, 503 U.S. 222, 112 S.Ct. 1130 (1992), the Court concluded that the presence of a vague aggravator in the weighing process created a greater risk of arbitrariness:

> A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance ... [T]he use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty.

Id. at 235-36.

Thus, the Court's jurisprudence has made it clear that capital sentencing decisions must be made according to criteria that are sufficiently clear to permit ordinary citizens to understand and apply them.

A corollary of this requirement is the constitutional prohibition against a capital sentencing decision made on the basis of false, inaccurate, or misleading information. In *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187 (1994), the Court held that the Due Process Clause of the Fifth and Fourteenth Amendments is violated where the capital sentencing decision is made on the basis of false, inaccurate, or misleading information. The jury that sentenced Simmons to death reasonably may have believed he could be released on parole if he were not sentenced to death. The Court concluded that such a misunderstanding "had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration." Id. at 161.

In *Shafer v. South Carolina*, 532 U.S. 36, 121 S.Ct. 1263 (2001), the Court reaffirmed the principles established in *Simmons*. A capital jury's choice to sentence someone to death should never be premised upon false, misleading, or inaccurate beliefs about parole eligibility precisely because such erroneous beliefs have the

effect of forcing the jury to choose death to make sure that the defendant is never released.

The CJP research demonstrates that capital jurors fail to understand and/or follow the instructions given in capital trials. This is consistent with pre-CJP and non CJP data and conclusions that significant numbers of capital jurors fail to understand the concept and role of mitigation in capital cases.[29] Capital jurors fail to understand that they are not only allowed to consider mitigation, but they are required to do so even if it does not excuse or lessen the capital defendant's culpability for the murder. Thus, the commands of *Lockett* are being ignored.

Over half of the capital jurors (56.4%) studied in California failed to understand that the jury did not have to be unanimous about individual mitigating factors before they were allowed to consider them. Moreover, a third (37.6%) believed mitigating factors had to have been proven to them beyond a reasonable doubt before they could be considered.[30]

The reasons for this massive misunderstanding of the rules which are supposed to guide and channel capital jury decision-making is the lack of familiarity with the capital sentencing process — i.e., the total absence of any culturally normative experience with the unique kind of decision capital jurors are called upon to make.

Americans are very familiar with a jury's role as fact-finder. This role is a longstanding part of our culture. On the other hand, Americans are <u>not</u> familiar with the role a capital jury has in making the decision as to whether the capitally accused should live or die.[31]

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[29] See, e.g., Apps. M, L, K, N, 0, and U at 26-32.
[30] App. A at 66-71.
[31] See, Apps. K, L, and M.

American jurors are accustomed to finding facts such as whether a weapon was used, whether a taking of property was a theft, or whether a driver was legally intoxicated. They are unaccustomed to deciding what weight to give a capital defendant's dysfunctional childhood, serious psychiatric disorder, or brain damage in a capital sentencing. Capital jurors have to resort to their own rules because terms like mitigation and aggravation have no meaning to them:

> [CA juror:] The first thing we asked for after the instruction was, could the judge define mitigating and aggravating circumstances. Because the different verdicts that we could come up with depended on if mitigating outweighed aggravating, or if aggravating outweighed mitigating, or all of that. So we wanted to make sure. I said: "I don't know that I exactly understand what it means." And then everybody else said, "No, neither do I," or "I can't give you a definition." So we decided we should ask the judge. Well, the judge wrote back and said, "You have to glean it from the instructions."
>
> [CA juror:] I don't think anybody liked using those terms because when we did use them, we got confused ... They were just confusing and I had never really used them before in anything. So, yeah, they sit there and throw these stupid words at you and I'm like, "Well, what do they mean?" I get so confused "cause they sound the same." I'm thinking, "Now which one was that again?" you know. And it totally confused me.

App. I at 168-69.

The net effect of these misunderstandings is that capital jurors are skewed toward a sentence of death.

> The misunderstandings reflected in these incorrect responses on the questions regarding how to handle mitigating and aggravating evidence all make a death sentence more likely. It is more difficult to find mitigating evidence than the law contemplates when jurors think they are limited to enumerated factors, must be unanimous, and need to be satisfied beyond a reasonable doubt. The CJP data show that nearly half (44.6%) of the jurors failed to understand the constitutional mandate that they be allowed to consider any mitigating evidence. Two-thirds (66.5%) failed to realize they did not have to be unanimous on findings of mitigation. Nearly half (49.2%) of the jurors incorrectly thought they

had to be convinced beyond a reasonable doubt on findings of mitigation ... The constitutional mandate of *Gregg* and companion cases to guide jurors' exercise of sentencing discretion is not being satisfied when jurors do not understand the guidance.

App. A at 71.

Table 3[32]	Percentages of Jurors Failing to Understand Guidelines for Considering Aggravating and Mitigating Evidence

JURORS WHO FAILED TO UNDERSTAND THAT THEY...

State	Could consider any mitigating evidence	Need not be unanimous on mitigating evidence	Need not find mitigation beyond reas. doubt	Must find aggravation beyond reas.doubt	N*	
Alabama	54.7%	55.8%	53.8%	40.0%	52	
California	24.2%	56.4%	37.6%	41.7%	149	
Florida	49.6%	36.8%	48.7%	27.4%	117	
Georgia	40.5%	89.0%	62.2%	21.6%	73	
Indiana	52.6%	71.4%	58.2%	26.8%	97	
Kentucky	45.9%	83.5%	61.8%	15.6%	109	
Missouri	36.8%	65.5%	34.5%	48.3%	57	

[32] 32 App. A at 68.

N. Carolina	38.7%	51.2%	43.0%	30.0%	79	
Pennsy.	58.7%	68.0%	32.0%	41.9%	74	
S. Carolina	51.8%	78.9%	48.7%	21.9%	113	
Tenn	41.3%	71.7%	46.7%	20.5%	44	
Texas	39.6%	72.9%	66.0%	18.7%	47	**
Virginia	53.3%	77.3%	51.2%	40.0%	43	
All States	44.6%	66.5%	49.2%	29.9%	1185	

* The number of subjects answering each question varied slightly, and the number (N) for each state is the lowest number of subjects answering any of the questions.

** The number of Texas jurors is reduced in this table because these two questions were replaced by others while the interviewing in Texas was underway.

D. Death Qualified Juries Violate Constitutional Principles Because Jurors' Believe They are Required to Return a Verdict of Death.

Beginning with *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Supreme Court has repeatedly made clear that capital jurors must be permitted to consider a wide range of mitigating circumstances in deciding whether death is the appropriate sentence. This principle flowed from earlier holdings rejecting capital sentencing schemes that made death mandatory for certain murders. In *Roberts v. Louisiana*, 431 U.S. 633, 97 S.Ct. 1993 (1977), the Court made it clear that death can never be the only appropriate penalty, even where a law enforcement officer is the victim:

> To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating

> circumstance. There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property. But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions.
>
> As we emphasized repeatedly in Stanislaus Roberts and its companion cases decided last Term, it is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense. Because the Louisiana statute does not allow for consideration of particularized mitigating factors, it is unconstitutional.

Id. at 636-37.

However, in no state are jurors free of the misconception that the law requires the death penalty if the evidence establishes that the murder was "heinous, vile or depraved" or the defendant would be "dangerous in the future."[33] Even in jurisdictions that do not have such defined aggravators, the numbers of overall jurors who believed that they were <u>required</u> to return a verdict of death is still staggeringly high. For example, in Indiana which does not have evaluative aggravators, over a third (34.4%) of all Indiana capital jurors interviewed believed that the death penalty was required if they found the murder "heinous, vile, or depraved." And, nearly the same proportion (36.6%) believed that they had to return a verdict of death if they believed that the defendant would be dangerous in the future. See Table 4, next page.

[33] See, App. Z which supports the proposition that future dangerousness is always at issue regardless of whether it is defined as a statutory aggravator.

Table 4[34] Percentages of Jurors Thinking Law Required Death if Defendant's Conduct was "Heinous, Vile or Depraved," or Defendant "Would be Dangerous" in Future by State

	DEATH REQUIRED IF DEFENDANT'S CONDUCT IS HEINOUS, VILE OR DEPRAVED	DEATH REQUIRED IF DEFENDANT WOULD BE DANGEROUS IN FUTURE	N*
Alabama	56.3%	52.1%	48
California	29.5%	20.4%	146
Florida	36.3%	25.2%	111
Georgia	51.4%	30.1%	72
Indiana	34.4%	36.6%	93
Kentucky	42.7%	42.2%	109
Missouri	48.3%	29.3%	58
N. Carolina	67.1%	47.4%	76
Pennsyl.	56.9%	37.0%	73
S. Carolina	31.8%	28.2%	110
Tenn.	58.3%	39.6%	48
Texas	44.9%	68.4%	117
Virginia	53.5%	40.9%	43
All States	43.9%	36.9%	1136

* The number of subjects answering each question varied slightly, and the number (N) for each state is the lowest number of subjects answering any of the questions.

[34] App. A at 72-73.

> The vast majority of jurors did not see themselves as most responsible for the sentence. Over 80% assigned primary responsibility to the defendant or the law, with 49.3% indicating the defendant and 32.85% indicating the law was most responsible. In contrast, only 5.5% thought the individual juror was most responsible, and only 8.9% believed the jury as a whole was most responsible ...

App. A, at 74-75

Death penalty statutes are not effectively guiding discretion when jurors misunderstand the instructions, mistakenly believe death is required by law, and do not appreciate their responsibility for the sentence imposed. The CJP finding that a large majority of jurors believe the law is "primarily responsible for the sentence is particularly ironic considering their lack of understanding of the law." App. A, at 75.

F. Death Qualified Juries Violate the Constitution Because of the Continuing Influence of Race on Juror Decision-Making.

Race is another improper consideration for a capital sentencing jury. Race cannot play any role in the capital jury's decision-making.

> In a capital sentencing proceeding before a jury, the jury is called upon to make a "highly subjective, 'unique, individualized judgment regarding the punishment that a particular person deserves.'"...
>
> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected ...
>
> The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence. "The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."

Turner v. Murray, 476 U.S. 28, 33-35, 106 S.Ct. 1683, 1686-1688 (1986).

Safeguards must be followed to minimize the risk of race infecting the capital sentencing determination. For this reason, a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. *Id.*

CJP data demonstrates that in all 14 states, the process of capital jury decision-making is influenced, not only by the race of the defendant and the race of the victim, but by both the racial composition of the jury and the race of the individual jurors. CJP data demonstrates that along gender lines, the outcome of a capital jury's verdict is greatly dependent on how many white males make it on to the jury, and whether any African American males serve as jurors.

The data demonstrates, for instance, that white male capital jurors (generally speaking) do not experience lingering doubt about the defendant's guilt. They; see the defendant as remorseless and are unable to put themselves in either the defendant's shoes or his family's shoes. They believe that the defendant will be dangerous in the future unless executed.

On the other hand, African American male capital jurors (generally speaking) frequently have at least some doubts about the evidence of guilt. They are able to see the defendant as someone who is sorry for what he has done. They are able to put themselves in the defendant's situation and understand what it must be like for the defendant's family. And, they do not see the defendant as someone who will hurt other people in the future.

It would be difficult to imagine a more arbitrary circumstance than having to depend on the racial composition of the jury for a life sentence. Nevertheless, the

data demonstrate that the outcome of a capital case is greatly dependent on the race of the individual jurors and on the overall racial composition of the jury as a whole.[35]

IX. Conclusion.

As applied in the real world of capital trials, actual death qualified jurors are not making sentencing decisions consistent with state and federal constitutional mandates. Any pretense that the law and procedures applicable to capital trials function to appropriately channel the jury's decision-making and eliminate death sentences that are imposed based upon arbitrary and capricious factors must be abandoned. Mr. DeMocker thus requests that this Court dismiss the State's Notice of Intent to Seek Death and prohibit the State from seeking the death penalty in this case.

In the alternative, Mr. DeMocker asks this Court to adopt the "two jury" procedure from New Mexico. Under this approach, the proceedings would begin with jury selection having nothing to do with death penalty issues. If Mr. DeMocker was found guilty by the initial jury, an additional venire would be brought in for death qualification and a sentencing proceeding. This process, while not addressing all of the constitutional implications raised by death-qualification, would at least attempt to minimize some of the devastatingly unconstitutional consequences of a death qualified jury at the guilt/innocence phase of Mr. DeMocker's trial.[36]

Because of the more than 20 remands that followed the Arizona litigation in *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428 (2002), this State has experienced the empanelment of death/life sentencing juries. There is no reason why that approach would prove impractical here.

DATED this 18th day of December, 2009.

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[35] App. G.
[36] App. JJ.

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LIST OF APPENDICES "A" THROUGH "Z" (attached as a CD)

A. Bowers, Foglia, Still Singularly Agonizing: Law's Failure To Purge Arbitrariness From Capital Sentencing (2003) 39 Crim. Law Bulletin 51

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HH. Id. at Table 4 -- Black and white jurors' (a) impressions of the defendant's remorsefulness, (b) identification with the defendant, (c) grounds for mercy; for selected defendant victim racial combinations

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OO. Id. at Table 2 -- Percentage of Jurors Considering Death the Only Acceptable Punishment for Six Types of Murder by State

PP. Id. at Table 3 -- Percentages of Jurors Failing to Understand Guidelines for Considering Aggravating and Mitigating Evidence

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ZZ. Bowers, Steiner, Death By Default..., supra at Appendix F, at Table 5 -- Most Common Four-Stage Punishment Pathways Followed by Capital Jurors Grouped by their Estimates of the Death Penalty Alternatives, at p.661

AAA. Id. at Table 3 -- Jurors' Stands on Punishment at Four Points in the Trial by Their Estimates of the Death Penalty Alternative, at p.654

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